

PRACTICE ADVISORY FOR VIRGINIA CRIMINAL DEFENDERS

Mitigating Harm for Undocumented Defendants: Enforcement Priorities, DACA and DAPA, and *U.S. v. Texas*

Prepared by CAIR Coalition's Virginia Justice Program, July 6, 2016

The Department of Homeland Security (DHS) issued a series of executive actions for noncitizens in November 2014. These actions included the formalization of a set of Enforcement Priorities for undocumented individuals and Deferred Action programs to provide temporary protection from deportation to certain undocumented individuals. Pursuant to a split 4-4 decision by the Supreme Court of the United States in *U.S. v. Texas*, 579 U.S. __ (2016), some of these programs are indefinitely enjoined. Even in the wake of *Texas*, however, the Enforcement Priorities program and the 2012 version of the Deferred Action for Childhood Arrivals (DACA) program remain intact. The expanded version of DACA and the Deferred Action for Parents of Americans (DAPA) program announced in 2014 are not functional but may become so in the future.

Considering these programs is vital to the effective defense of an undocumented client.

Practical Tips When Representing Undocumented Clients:

- 1) If possible, obtain a disposition that does not render your client an “**enforcement priority**.” See Chart on p. 3.
- 2) Determine if your client has **DACA** or is eligible for DACA, **expanded DACA or DAPA**. If so, obtain a disposition that does not constitute a bar to either program. Avoiding the enforcement priorities will usually also serve to preserve eligibility for DACA and DAPA. See Chart on p. 3.
- 3) Don't forget to consider other statutory and regulatory immigration consequences such as the grounds of inadmissibility and eligibility for Temporary Protected Status!

The Enforcement Priorities: Minimizing Risk for Undocumented Clients

The 2014 “priorities enforcement” memo outlines the categories of individuals against whom DHS officials are instructed to focus enforcement resources.¹ These categories also serve as the criminal bars to the now-enjoined DAPA program, discussed below. This memo remains in effect after *U.S. v. Texas*. The memo is not binding law and is subject to change with presidential administration; its implementation is also subject to vast discretion, so avoiding the enforcement priority categories is not a guarantee that DHS will refrain from enforcement in any given case. Nonetheless, the memo provides the most reliable guidance available regarding what criminal convictions are likely to result in DHS's apprehension of an undocumented client, leading to detention and removal proceedings. Many minor offenses – **including one DUI** – trigger the enforcement priority categories.

Avoiding the enforcement priorities is an important way to defend against negative immigration consequences for undocumented clients. See the Chart on p. 3 to conduct this analysis.

¹ The full memo, entitled “Policies for the Apprehension, Detention and Removal of Undocumented Individuals” and dated Nov. 20, 2014, is available online at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion_0.pdf.

Deferred Action Programs²

Deferred Action is a form of temporary protection against deportation that provides eligibility for work authorization. *It does not provide lawful permanent residence, a path to citizenship, or the opportunity to sponsor family members for lawful status.* The Deferred Action for Childhood Arrivals (DACA) program was first announced in 2012, and this program – often referred to as “original DACA” – was not at issue in *Texas* and remains functional today. The expanded version of DACA and the new Deferred Action for Parents of Americans (DAPA) programs that were announced in 2014 are indefinitely enjoined.

Criminal defense attorneys should be aware of the unique set of criminal bars to the original DACA program and aim to negotiate plea dispositions that preserve eligibility for DACA for individuals already enrolled in the program or eligible to enroll in the future. Undocumented clients who will be eligible for expanded DACA or DAPA should those programs become operational should seek to avoid a conviction that would constitute a bar to the relevant program. The enforcement priority categories discussed above serve as the criminal bars to DAPA eligibility. The bars to DACA eligibility are nearly identical. These bars are set forth in the Chart on p. 3.

Basic eligibility requirements for DAPA and DACA are as follows³:

	Original DACA (operational)	Expanded DACA (enjoined)	DAPA (enjoined)
Age requirement	Born after 6/15/1981	None	None
Age requirement at entry to U.S.	Before 16 th birthday	Before 16 th birthday	None
Continuous residence in U.S. since ...	6/15/07	1/1/10	1/1/10
Physically present and without lawful status in U.S. as of ...	6/15/12	6/15/12	11/20/14
Additional requirements	In school, graduated form high school, or GED	In school, graduated form high school, or GED	Has U.S. Citizen or Lawful Permanent Resident Child born on or before 11/20/14

Remember! The enforcement priority categories and the bars to DAPA and DACA are distinct from the criminal grounds of deportability and inadmissibility and the bars to relief found in the Immigration and Nationality Act (INA). For undocumented clients it is critical to analyze potential case outcomes under the INA as well as the new executive action programs even though the analyses will intersect in some ways.

Visit our website at <http://www.caircoalition.org/what-we-do/vjp/vjp-immigration-consequences-resources/> for more resources and/or email vjpconsultations@caircoalition.org for case-specific consultations.

² For clients interested in learning more information about DACA, expanded DACA, and/or DAPA, the National Immigration Law Center has produced thorough fact sheets online in English at <https://www.nilc.org/issues/daca/dapa-and-expanded-daca-programs/> and in Spanish at <https://www.nilc.org/issues/daca/dapa-y-daca-ampliada/>.

³ More information regarding eligibility criteria for all three programs is available on the website of United States Citizenship and Immigration Services at <https://www.uscis.gov/immigrationaction>.

Chart: The Enforcement Priorities and Bars to Deferred Action Programs For Virginia Criminal Defense Attorneys



Type of Offense	Enforcement Priority Category? Bar to Deferred Action for Parents of Americans (DAPA)?	Bar to Deferred Action for Childhood Arrivals (DACA) and expanded DACA?
Gang-related offenses – no conviction required	Yes, if convicted of offense for which element was participation in a criminal street gang or if “intentionally participated” in a gang to “further the illegal activity of the gang” at age 16 or older	No per se bar for gang-related conviction but “gang membership” considered an indicator of threat to public safety
Felony conviction	Yes	Yes
Aggravated felony conviction (see 8 U.S.C. § 1101(a)(43))	Yes	No
Any 3 or more misdemeanor convictions not arising out of same incident, excluding minor non-DUI traffic offenses	Yes	Yes (misdemeanor defined as any offense punishable by 6 days to 1 year jail time, so Virginia class 3 and 4 misdemeanors are excluded)
“Significant” misdemeanors, including: <ul style="list-style-type: none"> • Domestic violence offense • Sexual abuse or exploitation • Burglary • Unlawful possession or use of firearm • Drug distribution or trafficking • Driving under influence 	Yes	Yes (misdemeanor defined as any offense punishable by 6 days to 1 year jail time, so Virginia class 3 and 4 misdemeanors are excluded)
Any misdemeanor with > 90 days or ≥ 90 days active jail time (not including suspended sentences)	Yes (≥ 90 days)	Yes (> 90 days) (misdemeanor defined as any offense punishable by 6 days to 1 year jail time, so Virginia class 3 and 4 misdemeanors are excluded)
Juvenile delinquencies and expungements	Juvenile delinquencies are not treated as convictions; expunged convictions assessed on case by case basis	Not automatic bar

The Enforcement Priority categories serve as the bars to the DAPA program. The bars to DACA are similar but not identical. Little guidance has been provided as to how these categories will be defined, particularly with regard to the “significant misdemeanor” categories. Defense attorneys should remember that all Executive Actions programs are discretionary; avoiding a disposition that falls within these categories is by no means a guarantee of protection from immigration enforcement for any undocumented individual.

This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.

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